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Introduction

There are at least two potential understandings of "rights." Firstly, there is the moral claim of rights. Rights understood this way point to sets of behavior that are said to be morally desirable. This view typically overlaps with preferred policy outcomes and sees rights claims, rooted in a moral imperative, that aim at politically preferred outcomes. A second way of looking at rights would be to see them as claims that the law recognizes, even if it does so imperfectly in practice. To understand rights juridically is to insist upon a discourse that speaks the language of law, to acknowledge that it is through law that rights are both realized and rebuffed. It is through "rights talk,"[1] in other words, that lawyers lodge their claims, but it is important to point out that the "invisible college of international lawyers"[2] no longer monopolizes this conversation. Whole multitudes of actors have come to realize that they must articulate rights as legal claims, as a complement to their moral claims, if they are to be effective in "bringing rights home."[3]

The word "rights" also has a different meaning. "In all efforts for peace the overriding problem is to relate the sense of individual justice to the common good. The great tragedies of history occur not when right confronts wrong, but when two rights face each other."[4] When United States Secretary of State Henry Kissinger made these remarks at the Peace Conference on the Middle East in late December 1973, his words indicated a sense of competing justice claims. There is in this a discourse of contested narratives.[5] In the context of the Peace Conference on the Middle East, the narratives aligned against one another were Zionism (as the

[1] On this, see MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

[2] Oscar Schachter, *The Invisible College of International Lawyers*, 72(2) NW. U. L. REV. 217 (1977).

[3] To borrow a slogan of the United Kingdom Labour Party in the run-up to the adoption of the 1998 Human Rights Act. *See* Rights Brought Home: The Human Rights Bill, cmd. 3782 (1997).

[4] Addresses at the Opening Meeting of the Geneva Peace Conference, Dec. 21, 1973, *in* Israel's Foreign Relations: Volumes I–II: 1947–1974, http://mfa.gov.il/MFA/ForeignPolicy/MFADocuments/Yearbook1/Pages/21%20Addresses%20at%20the%20Opening%20Meeting%20of%20the%20Geneva.aspx. *See* AMOS OZ, HOW TO CURE A FANATIC (2010).

[5] For a conscious attempt to put forward the Zionist, Palestinian, and Arab narratives of the Arab–Israeli conflict without attempting to "take sides," *see* ARABS AND ISRAELIS: CONFLICT AND PEACEMAKING IN THE MIDDLE EAST (Abdel Monem Said Aly et al. eds., 2013). One of the purposes of *Arabs and Israelis: Conflict and Peacemaking in the Middle East*, Said Aly, Feldman, and Shikaki write, is to "convey that almost every important development in the history of the conflict was seen differently by each of the important parties and to show *how* differently these events were seen. Each of these parties *interpreted* these developments differently, each *explained* these developments differently and each *told* themselves and their neighbors *a different story* about what had happened." *Id.* at 2.

national liberation movement of the Jewish people) and Arab rights (in a predominantly Arab region of the world). The Palestinians remained, in effect, an afterthought of history, one of the reasons that the Palestine Liberation Organization (PLO) would have nothing to do with the proceedings in Geneva.[6] The Peace Conference on the Middle East did not represent the first attempt to settle a dispute framed largely in inter-State terms, but it was the first major initiative after the United Nations Security Council introduced a negotiation imperative in 1973.[7] It would be some time still, in September 1993, that this paradigm of peacemaking would expand to include a specifically bilateral element between Israel and the PLO.[8] Negotiation, first made imperative in 1973, continues to guide these peacemaking efforts as a matter of law.

This research aims to advance our understanding of the international law of negotiation and use this as a framework for assessing the Israeli–Palestinian dispute, with the Palestinian people's unsuccessful attempt to join the United Nations as a Member State in autumn 2011 and its successful attempt to join the same institution as a non-member observer State in autumn 2012 providing a case study for this. Over the decades, a variety of means have been used to settle the Israeli–Palestinian dispute, and the larger conflict between Israel and the Arab States within which it is embedded,[9] but negotiation has remained the dominant leitmotiv. That Israel and the PLO have channeled the settlement of their dispute through negotiation means that either party's failure to comply with this substantive obligation of law to negotiate can result in an internationally wrongful act and, in response, countermeasures and other responses by the victim party. The legal consequences of the Palestinian applications at the United Nations are not merely of historical interest; they inform the *present* rights and obligations of Israel and the Palestinian people. They must be taken seriously, furthermore, because they form part of a

[6] *See* Palestine Liberation Organization, Political Program, June 9, 1974, *in* ISRAEL IN THE MIDDLE EAST: DOCUMENTS AND READINGS ON SOCIETY, POLITICS, AND FOREIGN RELATIONS, PRE-1948 TO THE PRESENT 344, 345, ¶ 1 (Itamar Rabinovich & Jehuda Reinharz eds., 2d ed. 2008) ("reaffirm[ing] the Palestine Liberation Organization's previous attitude to Resolution 242 […], which obliterates the national right of our people and deals with the cause of our people as a problem of refugees. The Council therefore refuses to have anything to do with this resolution at any level, Arab or international, including the Geneva Conference").

[7] *See* S.C. Res. 338, at ¶ 3, U.N. Doc. S/RES/338 (Oct. 22, 1973) ("*Decides* that, immediately and concurrently with the cease-fire, negotiations shall start between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East").

[8] *See* Israel–PLO Recognition: Exchange of Letters Between PM Rabin and Chairman Arafat (Sept. 9, 1993), http://unispal.un.org/unispal.nsf/9a798adbf322aff38525617b006d88d7/36917473237100e285257028006c0bc5?OpenDocument; Letter Dated 8 October 1993 from the Permanent Representatives of the Russian Federation and the United States of America to the United Nations Addressed to the Secretary-General, Annex at 4, U.N. Doc. A/48/486 (Oct. 11, 1993) (Declaration of Principles on Interim Self-Government Arrangements).

[9] Of the Arab States, only Egypt and Jordan have peace treaties with Israel. *See* Peace Treaty Between Israel and Egypt, Mar. 26, 1979, *in* ISRAEL IN THE MIDDLE EAST, *supra* note 6, at 383; Letter Dated 9 January 1995 from the Permanent Representatives of Israel, Jordan, the Russian Federation, and the United States of America to the United Nations Addressed to the Secretary General, Annex at 3, U.N. Doc. A/50/73 (Jan. 27, 1995) (Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan, Oct. 26, 1994, Arava/Araba).

coordinated effort by the Palestinian people to engage with international institutions in a way that may undermine the bilateral negotiation imperative.[10]

This is a work of five substantive chapters. It roots itself in legal doctrine but recognizes that interdisciplinary insights can bring texture, nuance, and depth to legal analysis. This is not to say that this work's sometimes interdisciplinarity obviates controversy or somehow makes its legal analysis more "objective": the "erudite and fiercely contested polemic on facts and questions concerning geography, ethnography, linguistics and, above all, history"[11] that International Court of Justice (ICJ) Judge de Castro identified in *Western Sahara* seems to be just as inescapable when grappling with the Israeli–Palestinian dispute. Yet, it is hoped that recognizing this complexity will enrich this work in a way that ignoring it could not. Multiple voices and actors have something valuable to contribute to one's understanding of a multi-faceted contest of rights and obligations such as the Israeli–Palestinian dispute. Indeed, there is a sense of modesty in "admit[ting] that one's political opponents are not monsters,"[12] and in acknowledging that their views deserve to be seriously considered rather than cavalierly dismissed.

The dispute between Jews and Arabs in Palestine has a history older than the United Nations itself. "The history of each case is not limited to the successive attempts of its peaceful settlement: it also comprises its *causes* and *epiphenomena*," ICJ Judge Cançado Trindade suggests, "which have likewise to be taken carefully into account."[13] Appreciating the wisdom of Judge Cançado Trindade's insight, Chapter 2 stresses the importance of the law's intersection with developments in Palestine between the First and Second World Wars. These years saw international law shift in focus away from what had been the accepted practice of acquiring territory by war, to one that focused on the Mandate system and its "sacred trust of civilization."[14] While the Mandate system was an important (formal) break from previous post-war dispensations, vestiges of colonialism did remain during the interwar years,[15] and it would be incorrect to see the Mandate system as reflecting

[10] For background to the "Palestine 194" effort at the United Nations, see Jonathan Schanzer, State of Failure: Yasser Arafat, Mahmoud Abbas, and the Unmaking of the Palestinian State (2013). The present author reviewed Schanzer's *State of Failure: Yasser Arafat, Mahmoud Abbas, and the Unmaking of the Palestinian State* at: 5(1) J. Mid. E. & Afr. 91 (2014). On Palestinian engagements with some of international law's most politically-sensitive treaties, ranging in subject matter from the law of the sea and the recognition and enforcement of foreign arbitral awards to international human rights law and international humanitarian law, *see* State of Palestine, Palestine Liberation Organization, Negotiations Affairs Department, Statement by PLO Executive Committee Member Dr. Saeb Erekat on Palestine's Accession to International Treaties (Dec. 31, 2014), http://unispal.un.org/UNISPAL.NSF/0/6AC3115500C569E985257DC100552B95.

[11] Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 139 (Oct. 16) (De Castro, J., separate).

[12] U.S. v. Windsor, No. 12-307, at 25 (2013) (Scalia, J., dissenting).

[13] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, 543 (July 22) (Cançado Trindade, J., separate).

[14] Covenant of the League of Nations Adopted by the Peace Conference at Plenary Session, Apr. 28, 1919, 13(2) Am. J. Int'l L. Supp. 128, 137, art. 22(1) (1919).

[15] *See* R.P. Anand, *The Formation of International Organizations and India: A Historical Study*, 23(1) Leiden J. Int'l L. 5, 14 (2010) (stating that: "The League [of Nations (League)] had not accepted the principle of self-determination outside Europe. The mandate system of the League in India's view was nothing more than 'colonialism' and 'oppression' of the territories taken from Germany and Turkey and given to the imperialist powers, where conditions had further deteriorated").

more than a sense of proto-self-determination for the populations concerned. The idea of a distinct Palestinian Arab national sentiment was also *in statu nascendi* during this time. Chapter 2 examines the evolution of Palestinian Arab proto-self-determination and "peoplehood" during the Palestine Mandate and draws upon evidence that States gave to the United Nations Special Committee on Palestine in 1947 and other key primary documents on the Palestine question up to the 1948 War.

Chapter 3 begins in the wake of the 1948 War and the devastation that it caused to both Jews and Arabs in the region. Tragically, the United Nations Palestine Commission proved prescient in predicting, in a report dated February 16, 1948, that: "Powerful Arab interests, both inside and outside Palestine, are defying the resolution of the [United Nations] General Assembly [i.e., Resolution 181 (1947)] and are engaged in a deliberate effort to alter by force the settlement envisaged therein."[16] The General Assembly's call for "Independent Arab and Jewish States and the Special International Regime for the City of Jerusalem"[17] was not fulfilled. In the years that followed, the international community attempted a variety of means of dispute settlement with Israel and the Arab States, often in combination with one another: a form of inquiry, through the Security Council's Questionnaire of May 18, 1948; mediation, through the United Nations Mediator on Palestine; and conciliation, through the establishment of the United Nations Conciliation Commission for Palestine. Chapter 3 explores these disparate means of dispute settlement and traces their failure largely to the Arab world's rejectionist posture. It ends by showing how Resolution 338, which the United States and the Soviet Union introduced in the Security Council in late October 1973, fundamentally changed the nature of this debate with its call for "negotiations […] between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East."[18] The paradigm had shifted, and negotiation had become the imperative means of dispute settlement.

At the same time that one can observe that international law moved squarely behind a negotiation imperative in 1973, one should also be careful not to overlook the PLO's juridical "absence" from this landscape. "[B]read and circuses"[19] was how one General Assembly delegation described the inter-State dispute settlement efforts in late 1974. Chapter 4 explores how the years after 1973 saw the gradual emergence of a specifically bilateral negotiation imperative between Israel

[16] Letter from the Chairman of the United Nations Palestine Commission to the President of the Security Council Dated 16 February 1948, Annex at 1, 3, U.N. Doc. S/676 (Feb. 16, 1948) (First Special Report to the Security Council: The Problem of Security in Palestine). The Arab Office had cautioned the Anglo-American Committee of Inquiry less than two years earlier "not [to] be influenced by such questions as who can make the most trouble. But if it is a question of degree of violence, the Arabs are prepared to break the record—and not only in Palestine." Public Hearings Before the Anglo-American Committee of Inquiry, Jerusalem (Palestine), Mar. 25, 1946, at 128 (Mr. Shykayri).

[17] G.A. Res. 181, at (I)(A)(3), U.N. Doc. A/RES/181 (Nov. 29, 1947).

[18] S.C. Res. 338, *supra* note 7, at ¶ 3.

[19] U.N. GAOR, at 659, U.N. Doc. A/PV.2267 (Oct. 14, 1974) (Dahomey).

and the PLO and the crystallization of Palestinian international legal personality and (an unfolding sense of) self-determination for the Palestinians. It identifies this shift roughly through three phases: the Arab world's recognition of the PLO as an independent actor rather than a tool that they could "tame," a negotiation effort in Geneva, and the establishment of diplomatic relations between Egypt and Israel in the late 1970s; the PLO's decision to afford Israel some measure of recognition in 1988; and the Oslo dialogue of the early 1990s that led to formal negotiations and an exchange of letters between Israel and the PLO. By September 1993, the Palestinian people's international legal personality had unquestionably crystallized, and a dispute settlement process rooted in bilateral negotiations had become entrenched.

Given that an inter-State negotiation imperative was ushered into law in 1973 and a bilateral negotiation imperative between Israel and the PLO was introduced in September 1993, it becomes critical to understand the international law of negotiation as a means of dispute settlement. Chapter 5 attempts to do this, conscious that "identification of principles and guidelines of relevance to international negotiations could contribute to enhancing the predictability of negotiating parties, reducing uncertainty and promoting an atmosphere of trust at negotiations."[20] International law understands negotiation as a process, but this does not imply that negotiations are devoid of legal regulation.[21] Chapter 5 begins by looking at the relationship between negotiation (as a diplomatic means of dispute settlement) and other means of dispute settlement (of both a diplomatic and legal nature). Secondly, it examines when it can be said as a matter of law that negotiation has been tried and has been exhausted. Chapter 5 sustains one leading commentator's conclusion that the test is, in essence, whether a "genuine attempt in good faith to settle by negotiations has been made and that there is no reasonable probability that continuation or resumption of the process would turn out to be successful."[22] The final section in Chapter 5 considers a victim party's options when its negotiating counterpart has committed an internationally wrongful act by violating a substantive obligation of law to negotiate with it.

Chapter 6 brings to bear the international law of negotiation to recent Palestinian engagements with the United Nations. What were, and are, the legal consequences of the Palestinian people's unsuccessful attempt to join the United Nations as a Member State in autumn 2011 and its successful attempt to join the same institution as a non-member observer State in autumn 2012? Chapter 6 begins by looking at the precise nature of the rights and obligations that adhered to Israel and the PLO between September 1993 and the events of autumn 2011 and autumn 2012. Although the instruments that the two sides agreed to during these

[20] G.A. Res. 53/101, at pmbl., U.N. Doc. A/RES/53/101 (Dec. 8, 1998).

[21] Indeed, the "question whether prior negotiations did take place and whether or not they have failed is an objective one, in both a factual and legal sense." KAREL WELLENS, NEGOTIATIONS IN THE CASE LAW OF THE INTERNATIONAL COURT OF JUSTICE: A FUNCTIONAL ANALYSIS 181 (2014).

[22] *Id.* at 328.

years were by their nature *lex specialis*, the specificities that emerged from them seem to have largely mirrored the *lex generalis* of negotiation (and its emphasis on such considerations as good faith and meaningful engagement). After examining this complex matrix of law, Chapter 6 scrutinizes the texts associated with the two Palestinian applications and the reaction to them by diverse constellations of States. There appears to have been at least some degree of *prima facie* disconnect between the applications and the PLO's substantive obligation of law to negotiate with Israel, but the wrongfulness of the applications might nevertheless be precluded if one understands them as countermeasures in respect of an internationally wrongful act, actions taken in response to a material breach, or an expression of the legal principle *exceptio non adimpleti contractus* (the exception of non-performance). While the conclusions of Chapter 6 are tentative, it is hoped that they will encourage future scholars and practitioners to more readily engage with the international law of negotiation as a framework of legal evaluation, not only with respect to developments in the Israeli–Palestinian dispute since autumn 2012, but also more broadly for disputes that involve, *inter alia,* ongoing negotiations and competing self-determination claims.

Clarifying the law in this area can enhance the ability of parties to disputes that threaten the peace (or that risk doing so) to de-escalate their rhetoric and settle their differences on a more predictable and sustainable footing. But one should not exaggerate the case. Despite the claims of some international lawyers, international law only goes so far, and it is but one instrument of international relations. "[N]either a chimera nor a panacea," Brierly prefaced the first edition of his seminal *Law of Nations* (1928), international law is "just one institution among others which we have at our disposal for the building up of a saner international order."[23] One would do well neither to exaggerate nor underestimate its efficacy in world affairs.[24]

What must be appreciated, in summary, is that as much as it is desirable to clarify the international law of negotiation, interested parties must not neglect the existence of "divergent realities [between Israel and the Palestinian people]. Each side views the other as having acted in bad faith; as having turned the optimism of Oslo into the suffering and grief of victims and their loved ones."[25] The 2001 Sharm El-Sheikh Fact-Finding Committee Report made this observation in the wake of the outbreak of the second *intifada*, or "uprising," but it just as acutely describes the present moment. The enduring challenge is for international law to facilitate a productive reconciliation of these "divergent realities." This work seeks to equip the reader with some of the tools for doing this.

[23] Andrew Clapham, Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations v (7th ed. 2014).

[24] *See id.* at v–vi.

[25] Report of the Sharm El-Sheikh Fact-Finding Committee, Apr. 30, 2001, http://unispal.un.org/unispal.nsf/9a798adbf322aff38525617b006d88d7/6e61d52eaacb860285256d2800734e9a?OpenDocument.